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9 Attorneys for Plaintiff
10 RUSSELL BRIMER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

FPC CORPORATION; and DOES 1-150,
inclusive,

Defendants.

Case No. CGC-10-505320

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and FPC Corporation**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer”) and FPC
4 Corporation (“FPC”), with Brimer and FPC collectively referred to as the “Parties.”

5 **1.2 Plaintiff**

6 Brimer is an individual residing in California who seeks to promote awareness of exposures to
7 toxic chemicals and improve human health by reducing or eliminating hazardous substances
8 contained in consumer products.

9 **1.3 Defendant**

10 FPC employs ten or more persons and is a person in the course of doing business for purposes
11 of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §
12 25249.6 *et seq.* (“Proposition 65”).

13 **1.4 General Allegations**

14 Brimer alleges that FPC has sold in the State of California tape measures with hand straps
15 containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to the State of
16 California to cause birth defects or other reproductive harm. Lead is also referred to herein as the
17 “Listed Chemical.”

18 **1.5 Product Description**

19 The products that are covered by this Consent Judgment are defined as tape measures with
20 hand straps containing the Listed Chemical including, but not limited to, the *HomeTools Florals 10*
21 *ft. Tape Measure, HT-212 (#0 18239 33169 7)*. All such items shall be referred to herein as the
22 “Products.”

23 **1.6 Notice of Violation**

24 On June 17, 2010, Brimer served FPC and various public enforcement agencies with a
25 document entitled “60-Day Notice of Violation” (“Notice”) that provided FPC and such public
26 enforcers with notice that alleged FPC was in violation of Proposition 65 for failing to warn
27 consumers and customers that the Products exposed users in California to lead.
28

1 **1.7 Complaint**

2 On November 10, 2010, Brimer, who alleges that he was and is acting in the interest of the
3 general public in California, filed a complaint in the San Francisco Superior Court (“Complaint”),
4 naming FPC as a defendant and alleging violations of Proposition 65 by FPC based on the alleged
5 exposures to lead contained in the Products it manufactured, distributed, and/or offered for sale in
6 California.

7 **1.8 No Admission**

8 FPC denies the material, factual, and legal allegations contained in the Notice and Complaint
9 and maintains that all of the products that it has sold in California, including the Products, have been,
10 and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an
11 admission by FPC of any fact, finding, conclusion, issue of law, or violation of law; nor shall
12 compliance with this Consent Judgment constitute or be construed as an admission by FPC of any
13 fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by FPC.
14 However, this section shall not diminish or otherwise affect the obligations, responsibilities, and
15 duties of FPC under this Consent Judgment.

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over FPC as to the allegations contained in the Complaint, that venue is proper in the
19 County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of
20 this Consent Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean January 10,
23 2011.

24 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

25 **2.1 Reformulation Commitment**

26 After the Effective Date, FPC shall not purchase and/or import Products that will be sold or
27 offered for sale in California unless they are “Reformulated Products.” For purposes of this Consent
28 Judgment, Reformulated Product shall mean Products containing lead in concentrations less than 90

parts per million when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 6010B and yield no more than 1.0 micrograms of lead when analyzed pursuant to NIOSH Test Method 9100 performed on any accessible component (i.e. any component part that may be handled, touched or mouthed during the reasonably foreseeable use or misuse by a consumer).

3. MONETARY PAYMENTS

3.1 Payments Pursuant to California Health & Safety Code § 25249.7(b)

Pursuant to Health & Safety Code § 25249.7(b), in settlement of all claims alleged in the Notice and Complaint, FPC shall pay a civil penalty of \$4,000. The penalty is to be apportioned in accordance with California Health & Safety Code §§ 25249.12(c)(1) & (d), with seventy-five percent of the penalty amount remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining twenty-five percent of the penalty paid to Brimer. FPC shall issue two checks for the penalty payment: (a) one check made payable to "The Chanler Group in Trust for OEHHA" in the amount of \$3,000; and (b) one check to The Chanler Group in Trust for Russell Brimer in the amount of \$1,000. Two separate 1099s shall be issued for the above-payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be provided five calendar days before the payment is due. Payment shall be delivered to Brimer's counsel within ten days of the Effective Date, at the following address:

The Chanler Group
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

4. REIMBURSEMENT OF FEES AND COSTS

4.1 Attorney Fees and Costs

The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. FPC then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Brimer and his counsel under general contract principles and the private attorney general doctrine codified at

1 California Code of Civil Procedure (“CCP”) § 1021.5, for all work performed through the mutual
2 execution of this agreement. Defendants shall reimburse Brimer and his counsel \$28,000 for fees and
3 costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a
4 settlement in the public interest. This figure includes Brimer’s future fees and costs including
5 attorneys’ fees to be incurred in seeking judicial approval of this Consent Judgment as well as any
6 other legal work performed after the execution of this Consent Judgment incurred in an effort to
7 obtain finality of the case. However, in the event a third party were to appeal entry of this Consent
8 Judgment, Plaintiff and his counsel shall be entitled to seek their reasonable attorneys’ fees and costs
9 associated with all appellate work defending the entry of judgment pursuant to CCP § 1021.5. The
10 payment for reimbursement of fees and costs shall be made payable to “The Chanler Group” and
11 shall be delivered within ten days of the Effective Date to the following address:

12 The Chanler Group
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710

17 A 1099 shall be issued to “The Chanler Group” (EIN: 94-3171522) for the amount of the
18 reimbursement of Plaintiff’s fees and costs.

19 **5. RELEASE OF ALL CLAIMS**

20 **5.1 Brimer’s Release of FPC**

21 In further consideration of the promises and agreements herein contained, and for the
22 payments to be made pursuant to Sections 3.1 and 4.1 above, Brimer, on behalf of himself, his past
23 and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
24 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
25 legal action and releases all claims, including, without limitation, all actions, causes of action, suits,
26 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but
27 not limited to, investigation fees, expert fees, and attorneys’ fees) of any nature whatsoever, whether
28 known or unknown, fixed or contingent, at law or in equity (collectively “Claims”), against FPC and
each of its past and current downstream distributors, wholesalers, licensors, licensees, auctioneers,
retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate

1 affiliates, and subsidiaries, and their respective past and current officers, directors, principals,
2 partners, members, attorneys, representatives, shareholders, agents, and employees, and sister and
3 parent entities (collectively "Releasees"). This release is limited to those claims that arise under
4 Proposition 65, as such claims relate to FPC's alleged failure to warn about exposures to or
5 identification of the Listed Chemical contained in the Products. The Parties further agree that this
6 release shall not extend upstream to any entities that manufactured the Products or any component
7 parts thereof, or to any distributors or suppliers who sold Products or any component parts thereof to
8 FPC.

9 **5.2 FPC's Release of Brimer**

10 FPC waives any and all claims against Brimer, his attorneys and other representatives, for any
11 and all actions taken or statements made (or those that could have been taken or made) by Brimer and
12 his attorneys and other representatives, whether in the course of investigating claims or otherwise
13 seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

14 **6. COURT APPROVAL**

15 This Consent Judgment is not effective until it is approved and entered by the Court and shall
16 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
17 has been fully executed by all Parties, in which event any monies that have been provided to Brimer
18 or his counsel pursuant to Sections 3.1 and/or Section 4.1 above shall be refunded within fifteen days
19 after receiving written notice from FPC that the one-year period has expired and the Consent
20 Judgment has not been approved by the Court.

21 **7. SEVERABILITY**

22 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
23 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
24 remaining shall not be adversely affected.

25 **8. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the State of California
27 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
28 otherwise rendered inapplicable by reason of law generally, or as to the Products, then FPC may

1 provide written notice to Brimer of any asserted change in the law, and shall have no further
2 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
3 so affected. Nothing in this Consent Judgment shall be interpreted to relieve FPC from any
4 obligation to comply with any pertinent state or federal toxics control laws.

5 **9. NOTICES**

6 Unless specified herein, all correspondence and notices required to be provided pursuant to
7 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
8 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the
9 other party at the following addresses:

10 For FPC:

11 Patrick Kamins, Secretary
12 FPC Corporation
13 355 Hollow Hill Road
14 Wauconda, IL 60084

15 For Brimer:

16 Proposition 65 Coordinator
17 The Chanler Group
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

21 Any party, from time to time, may specify in writing to the other party a change of address to which
22 all notices and other communications shall be sent.

23 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

24 This Consent Judgment may be executed in counterparts and by facsimile, each of which shall
25 be deemed an original, and all of which, when taken together, shall constitute one and the same
26 document.

27 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

28 Brimer agrees to comply with the reporting form requirements referenced in California Health
& Safety Code § 25249.7(f).

12. ADDITIONAL POST EXECUTION ACTIVITIES

The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a

1 noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
2 obtaining such approval, Brimer and FPC and their respective counsel agree to mutually employ their
3 best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
4 Consent Judgment by the Court in a timely manner. For purposes of this section, "best efforts" shall
5 include, at a minimum, cooperating on the drafting and filing of any papers in support of the required
6 motion for judicial approval.

7 **13. MODIFICATION**

8 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
9 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
10 any party and entry of a modified consent judgment by the Court

11 **14. AUTHORIZATION**

12 The undersigned are authorized to execute this Consent Judgment and have read, understood,
13 and agree to all of the terms and conditions hereof.

14
15 **AGREED TO:**

16 **RUSSELL BRIMER**

17 
18 _____

19 Date: 1-10-11
20 _____

AGREED TO:

FPC CORPORATION

By: _____

Its: _____

Date: _____